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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 434

SIDNEY W. WILSON, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Sidney W. Wilson, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit decided in the above case on May 9, 1957 by which that Court affirmed orders entered by respondent suspending petitioner's airline transport pilot certificate.

OPINIONS BELOW

The Initial Decision of the Civil Aeronautics Board Hearing Examiner was issued October 18, 1955 It is not officially reported but appears in the Joint Appendix below as certified to this Court (J.A. 5-22). The

original Opinion and Order of the respondent, Civil Aeronautics Board, was issued March 28, 1956. It also is not reported officially but appears in said Joint Appendix below (J.A. 22-31). On reconsideration the Board issued its Supplemental Opinion and Order on July 31, 1956 which appears in the Joint Appendix aforesaid (J.A. 32-38). The Opinion of the Court of Appeals (U.S. App. D.C. , 244 F. 2d 773) is printed in the Appendix hereto. (pp. 1a to 3a)

JURISDICTION

The judgment of the Court of Appeals was entered May 9, 1957 and is included in the record as transmitted to this Court. The basis of jurisdiction in that court was Section 1006 of the Civil Aeronautics Act of 1938, 49 U.S.C. 646. This petition for a writ of certiorari is filed within the time prescribed in 28 U.S.C. Sec. 2101(c), as further extended to September 7, 1957 by Order of this Court dated July 26, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and 49 U.S.C. Sec. 646(f).

QUESTIONS PRESENTED

In a proceeding under Section 609 of the Civil Aeronautics Act of 1938, as amended, (49 U.S.C. Sec. 559, 52 Stat. 1011) the Civil Aeronautics Board issued, on reconsideration, an order suspending petitioner's airline transport pilot certificate for a period of ten days. There was no finding, nor was it contended, that petitioner was in any way unqualified to hold such certificate, the ten-day suspension having been ordered as a deterrent sanction against petitioner for violation of the Civil Air Regulations. The Court of Appeals affirmed the Board's Order.

The questions presented, therefore, are (1) whether under Section 609 of the Civil Aeronautics Act of 1938, Congress intended to empower the Board to suspend the airman certificate of a qualified pilot purely as a deterrent sanction for penal purposes, and (2) whether a long standing practice and custom of the Board is sufficient to justify the exercise of such penalty power under Section 609 of the Act.

STATUTES AND REGULATIONS

The pertinent provisions of the Civil Aeronautics Act of 1938 are Sections 609, 901 and 903, together with Civil Air Regulations Secs. 21.16, 21.41, 21.42, 21.24(d) and 40.301-302, all of which are set out in the Appendix hereto, pp. 3a to 7a, so far as material here.

STATEMENT OF THE CASE

Petitioner, Sidney W. Wilson, is an airline transport pilot employed by National Airlines, Inc. (J.A. 22). On December 31, 1954, the Administrator of Civil Aeronautics, asserting his authority under Section 609 of the Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. 401 et seq.) filed a Complaint (J.A. 3-4) with the Civil Aeronautics Board alleging that petitioner, on July 6, 1954, while pilot-in-command of National Airlines Flight 611, a DC-6B aircraft, engaged in air commerce between Miami, Florida and Pittsburgh, Pennsylvania, had violated certain Civil Air Regulations in that he did not execute the missed approach procedure specified in the standard instrument approach procedure for Runway 28 at the Greater Pittsburgh Airport (J.A. 22-23). It was further alleged that petitioner violated the regulations in failing to maintain a continuous radio watch on the appro-

priate frequency (J.A. 23). A hearing was held by CAB Examiner Caldwell who found that petitioner had violated the regulations as alleged but, considering that petitioner had a clear record of over 10,000 flying hours to his credit, and inasmuch as he had flown continuously without incident during the fifteen months that had elapsed between the violation incident and the Initial Decision, stated that ". . . any suspension of respondent's airline transport pilot rating . . .. would in effect be a punishment and not of a remedial nature." (J.A. 20) The Examiner was of the further opinion that "no useful purpose" would be served by imposing a suspension of the certificate and that "the public interest at this time does not require any remedial action." (J.A. 20)

The case was appealed to the respondent Board which, on March 28, 1956, affirmed the Examiner and found that the record did not contain any evidence as to the need for a "suspension as a punitive or deterrent sanction." (J.A. 30) However the Administrator petitioned for reconsideration on the grounds that "it is the added duty of the Board" (J.A. 35) to impose adequate sanctions for violation of the regulations and that the Board did not consider whether its action would have a deterrent effect on other pilots. (J.A. 36) On reconsideration the Board agreed with the Administrator and issued its Supplemental Order suspending the petitioner's certificate for a ten day period. (J.A. 37) A Petition for Reconsideration of this Supplemental Opinion, filed on the grounds that the Board exceeded its statutory powers by issuing the penalty sanction, (J.A. 38-40) was denied by the Board but an appropriate order was issued staying execution of the suspension. (J.A. 41-43) A Petition for Review

of the Board's Order was filed under authority of Section 1006 of the Act, 49 U.S.C. 646, in the United States Court of Appeals for the District of Columbia Circuit.

The Court of Appeals affirmed the Board's Supplemental Order of Suspension in an Opinion dated May 9, 1957, holding that Section 609 of the Act conferred broad discretionary authority upon the Board and stating:

> "Nothing in the Act or its legislative history persuades us that disciplinary action for violation of regulations was intended to be the exclusive province of Section 901."

In addition, the Court held that the practice of the Board since 1938 has been to impose such suspensions and that this consistent and unchallenged administrative practice would not be overturned except for very cogent reasons. The Court was of the opinion that air safety supported this practice.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS BELOW IS IN PROBABLE CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

1. The Asserted Power to Punish Under Section 609

Regardless of whether the action of the Board is termed a forfeiture, deterrent sanction, or disciplinary action for violations of Civil Air Regulations, it is still, nonetheless, a penalty. The Board itself, in a case decided shortly before the present one, carefully analyzed the nature of a suspension of an airman's certificate because of a violation of the Civil Air Regulations and *for the first time* specifically held as follows:

> "We are inclined to the view, and hold, that suspensions imposed merely to prevent and deter violations, and where requalification in one or more respects is not involved, are punitive in the constitutional sense, and are a type of 'penalty' from which immunity is provided by Section 1004(i)." *Brubaker and Olsen,* CAB Dockets SR-2168, 2169, August 2, 1954.

This, of course, conforms with a long line of federal cases and can leave little doubt that the Order herein constitutes a penalty. See *Huntington* v. *Attrill,* 146 U.S. 657, 668; *Helwig* v. *United States,* 188 U.S. 605, 611; *Brown* v. *Civil Aeronautics Authority,* 112 F. 2d 737 (C.A. 9); *Porter* v. *Montgomery,* 163 F. 2d 211 215 (C.A. 3); *Heitmuller* v. *Berkow,* 83 U.S. App. D.C. 70, 165 F. 2d 961, 962; *Lee* v. *Civil Aeronautics Board,* 96 U.S. App. D.C. 299, 225 F. 2d 950, Judge Prettyman, dissenting on another issue, 225 F. 2d 953.

Actually, Section 609 of the Act is a purely remedial statute whereby Congress has granted the Board power to "reinspect" aircraft and their components and "reexamine" airmen and, thereafter, "if the interest of the public so requires", to alter, amend, modify, suspend and revoke certificates previously issued under powers delegated in other sections of the Act. Petitioner does not contest Section 609 as a remedial provision, but questions whether it may be used to invoke penal sanctions.

It is believed that the decision below is unique in that it is apparently the first time any court has implied a penal power from statutory language which in no way contains a penalty provision or any language suggestive of punishment.

A long line of cases has consistently upheld the principle that authority to penalize will not be presumed unless the statute involved expressly provides the power. *United States* v. *200 Barrels of Whiskey*, 95 U.S. 571, 576, *Keppel* v. *Tiffin Savings Bank*, 197 U.S. 356, 362, 373, *Iselin* v. *U. S.*, 270 U.S. 245, *Campbell* v. *Galeno*, 281 U.S. 599, *Wallace* v. *Cutten*, 298 U.S. 229, *L. P. Steuart & Bro. Inc.* v. *Bowles*, 322 U.S. 398, 404.

L. P. Steuart & Bro. v. *Bowles, supra*, was a wartime case in which this Court found that the power to allocate rationed materials included the power to withhold such materials when it was established that the petitioner had used these crucial wartime goods in violation of the statute. The Court concluded that a suspension order preventing the dealer from obtaining his share of these materials was remedial in nature. It should be noted, however, that the Court expressly affirmed the principle that penalties for punitive purposes will not be implied from general words of a statute, stating at 322 U.S. 404:

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. (Citing cases) Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record."

It should be further noted that the present case is not a matter involving legislative inadvertence (Cf. *United States* v. *Weitzel*, 246 U.S. 533, 543) or the

application of the "rule of necessity". It is strictly a question of whether a penal power can be read into Section 609 by implication. Congress expressly provided for punishment of violators of the act and regulations in Sections 901 and 902. In Sections 901 and 903 the specific civil penalties and the procedures are set out including the right to a trial by jury. Both the language and the jurisdictional amount in Section 903 follow the wording of the Seventh Amendment to the Constitution. As a practical result of the decision below any holder of a certificate issued by the Civil Aeronautics Administration becomes dependent upon the whim of the Administrator for a statutory right to a trial by jury in cases where it is sought to punish such certificate holder; he has been afforded a statutory right to a jury trial, which by such interpretation is no longer his to demand. We need not remind this Court that any seeming curtailment of a right to a jury trial will be severely scrutinized. *Dimick* v. *Schiedt*, 293 U.S. 474; *District of Columbia* v. *Colts*, 282 U.S. 63.

2. Analogous Statutes as Aids in Construction

We believe the statute is clear in providing a judicial forum for penalty proceedings against alleged violators (Sections 901-903). Nevertheless, to dispel any doubts as to the legislative intention, it is appropriate to examine other enactments in related fields of government activity. See, *Boston Sand Co.* v. *U. S.*, 278 U.S. 41; and *United States* v. *C. I. O.*, 335 U.S. 106.

The most analogous law is the statute regulating the merchant marine. That act in direct language empowers the Coast Guard Commandant to suspend or

revoke certificates for specified violations. The pertinent section reads:

> "In any investigation of acts of incompetency or misconduct or of any act in violation of the provisions of title 52 of the Revised Statutes or of any of the regulations issued thereunder, committed by any licensed officer or any holder of a certificate of service, the person whose conduct is under investigation shall be given reasonable notice of the time, place and subject of such investigation and an opportunity to be heard in his own defense. The whole record of the testimony received by such investigation and the findings and recommendations shall be forwarded to the Commandant of the Coast Guard, and if that officer shall find that such licensed officer or holder of certificate of service is incompetent *or has been guilty of misbehavior, negligence, or unskillfulness, or has endangered life, or has willfully violated any of the provisions of title 52 of the Revised Statutes or any of the regulations issued thereunder, he shall,* in a written order reciting said findings, *suspend or revoke the license or certificate* of service of such officer or holder of such certificates . . ." (Italics supplied). R. S. 4450; March 3, 1911, c. 231, or Sec. 291, 36 Stat. 1167, as amended May 27, 1936, 49 Stat. 1381; 46 U.S.C.A. 239 (g).

The section pertaining to sea captains, who certainly are akin to airline captains, reads:

> "*Licenses of captains* . . . such license shall be suspended or revoked upon satisfactory proof of bad conduct, intemperate habits, incapacity, inattention to his duties, or the willful violation of any provision of this chapter . . . applicable to him." 46 U.S.C.A. 226.

The Communications Act of 1934, as amended, is equally helpful in demonstrating that the Congress is

able properly to manifest its intention of conferring punishment power. There, the Federal Communications Commission is empowered to affirm, modify, suspend, or revoke certificates in issue after notice of hearing. It specifically enumerates a detailed list of violations such as "violating any act, treaty or convention, . . . willfully damaging radio apparatus, transmitting false or deceptive signals, . . . willfully or maliciously interfering with any other communication or signal . . ." etc. 47 U.S.C.A. 303 (m).

As to violators of radio operations aboard ship the Federal Communications Commission is empowered as follows:

> ". . . If the holder of a certificate *violates* the radio provisions of the Safety Convention or the provisions of this chapter, or the rules, regulations or conditions prescribed by the Commission, and if the efficient administration of the Safety Convention or of this part so requires, the Commission, after hearing, is authorized to *modify or cancel a certificate* which it has issued . . ." (Italics supplied) June 19, 1934, 50 Stat. 195, 60 Stat. 697 as renumbered in 68 Stat. 706, 707, 47 U.S.C.A. 359.

See also, the Securities Exchange Act of 1934, 15 U.S.C. 78s, 48 Stat. 898, and the Interstate Commerce Act, Part II, Sec. 212, 49 U.S.C.A. 312, 49 Stat. 555, which specifically allow suspension where a licensee has willfully failed to comply with the Act or regulations.

Contrasting the punitive provisions of these Acts with the broad general terms of Section 609 clearly illustrates the remedial nature of that Section and emphasizes the absence of the typical statutory language that is essential in order to sustain the Board's action

in inflicting a penalty suspension for an alleged violation. See *Fong Haw Tan* v. *Phelan*, 333 U.S. 6.

Even in statutes of the merchant marine type, there is hesitancy to allow penal jurisdiction to be exercised by quasi-judicial bodies. In *Bulger* v. *Benson*, 262 Fed. 929 (C.A., 9, 1920) the Federal Supervisory Inspector filed a complaint charging that the Master of a ship was guilty of inattention to duty and had violated certain Pilot Operating Rules which caused his vessel to have a collision. After hearing, specific statutory authority was cited to sustain a fine of $50 and a suspension of the Master's license for six months. The government's argument that this was a remedial action was rejected by the Court of Appeals in holding that the statute was "penal in its nature" and that the suspension order under the procedure followed by the Government was in excess of the statutory authority. Only the $50 fine was upheld.

3. The Lack of Sufficient Standards in Section 609 When Used as a Penal Statute

Another reason for denying the power to punish under Section 609 is that it lacks an adequate criterion. There is neither an applicable uniform standard nor a limitation on the punishment. The penalty to fit the alleged violation can be tailored by the administrative agency as it sees fit. This, we suggest, is quite distasteful to a legal system which insists upon due process as its cornerstone, and certainly approaches the brink of violating constitutional safeguards. It has been repeatedly stated by this Court that legislative enactments must be construed not only to avoid the conclusion that they are unconstitutional but also to avoid grave doubts on that score. *United States* v. *Delaware*

& Hudson Company, 213 U.S. 366, 408; *United States* v. *Jin Fuey Moy,* 241 U.S. 394, 401; *Federal Trade Commission* v. *American Tobacco Company,* 264 U.S. 298, 307; *United States* v. *LaFranca,* 282 U.S. 568, 574; *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337, 352; Cf. *Crowell* v. *Benson,* 285 U.S. 22, 62; *Everson* v. *Board of Education,* 330 U.S. 1.

In Champlin Refining Company v. *Corporation Commission,* 286 U.S. 210, 240-43, this Court rejected the contention that an oil allocation statute was remedial and held that actually it was imposing additional penalties for violations of the Act. It was, therefore, held void for lack of a definite standard, quoting at p. 242, the following statement from *Connally* v. *General Construction Co.,* 269 U.S. 385, 391:

> " 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' "

4. The Applicability of Administrative Construction

The Court below stated that since 1938 the Board has consistently suspended airmen's certificates for violation of the regulations. There appears to be some doubt in the Board itself as to this consistency, for as late as October 18, 1955 in the Initial Decision herein the Hearing Examiner referred to his powers in remedial terms (J.A. 20-21) thus following the language

and meaning of the Board's own Rules in Air Safety Proceedings:

> "301.26 Initial Decision. (b) Where the examiner has determined that remedial action is required the examiner shall inquire of the Administrator if there is any record of previous suspensions or revocations of Respondent's certificates; whether Respondent has had any assessment of civil penalties levied on him or any previous disciplinary action for violation of air safety standards; whether proper notice thereof has been given Respondent, and request copies of any reply thereto."

Further, the question here has never previously been actually contested and argued before the Board, and it cannot reasonably be held to have decided the penal nature of a suspension for violation of regulations until *Brubaker and Olsen,* CAB Dockets No. SR-2168, 2169 (Aug. 2, 1954), quoted above. Under these circumstances no effect should be given to the so-called administrative practice. See *Anderson* v. *McKay,* 94 U.S. App. D.C. 11, 211 F. 2d 798 and, *Order of Railway Conductors* v. *Swan,* 152 F. 2d 325 (C.A. 7), aff'd. 329 U.S. 520. Only last spring this Court in *United States* v. *E. I. DuPont de Nemours & Co.,* 353 U.S. 586, 590 overruled an argument that a thirty-five year administrative practice by the Federal Trade Commission in refusing to apply Section 7 of the Clayton Act to so-called "vertical acquisitions" was persuasive as to the intent of Congress. This Court held that the question was being decided by it for the first time and that not only had the Court the duty to reconcile administrative interpretations with the policies laid down by Congress, but that the failure of the Commission to act was "not a binding administrative interpretation that Congress did not intend vertical acquisitions to

come within the purview of the Act." By the same reasoning, it is submitted that the previous actions by the Civil Aeronautics Board in suspending certificates as punishment for violations does not bind the Courts.

Certainly administrative rulings cannot add to the terms of an act of Congress and make conduct criminal which such laws leave untouched. *United States* v. *Standard Brewery,* 251 U.S. 210, 220. Moreover, the rule as to the persuasive effect of administrative practice is applicable only where the statute is ambiguous or doubtful, *Louisville & Nashville Ry.* v. *United States,* 282 U.S. 740, 757 and where an administrative agency assumes a power plainly not granted, no amount of administrative interpretation in favor of the assumed power is binding upon the courts. *Texas Pacific Ry. Co.* v. *United States,* 289 U.S. 627, 640.

In *Sanford's Estate* v. *Commissioner of Internal Revenue,* 308 U.S. 39, Mr. Chief Justice Stone stated at p. 52:

> "Administrative practice may be of persuasive weight in determining the construction of a statute of *doubtful meaning* where the practice *does not conflict with other provisions of the statute and* is not *so inconsistent with applicable decisions of the Courts* as to produce inconsistency and confusion in the administration of the law." (Italics supplied)

and further at p. 53:

> "The very purpose sought to be accomplished by judicial acceptance of an administrative practice would be defeated if we were to regard the present practice as controlling. If a practice is to be accepted because of the superior knowledge of administrative officers of the administrative needs

and convenience (citation) there is no such reason for its acceptance here."

We concede that Section 609, when viewed in its *remedial* context, grants broad general powers, but we strongly urge that it is clear and unambiguous in not providing punishment for violators. The respondent has heretofore relied on the Section 609 phrase "if the interest of the public so requires "as granting the power to punish for violations, but it has been stated by this Court that the phrase "in the interest of the public" contained in Section 411 (49 U.S.C. 491, 66 Stat. 628) of the Act is not sufficient to impute punitive powers. In *American Airlines* v. *North American*, 351 U.S. 79, 85 this Court stated,

> "*The section is not concerned with punishment of wrongdoing* or protection of injured competitors, but rather with protection of the public interest." (Italics supplied)

By the same token, Section 901, not availed of by respondent here, is unequivocal in providing penalties for such violators.

Norwegian Nitrogen Co. v. *United States*, 288 U.S. 294 the only citation in the opinion below, in petitioner's view does not affect the validity of the foregoing contentions. The full statement from which the Court quoted is at p. 315 of 288 U.S., as follows:

> "*True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction.* True it also is that administrative practice consistent and generally unchallenged will not be overturned except for very cogent reasons if the scope of command is indefinite and doubtful (citing cases)." (Italics supplied)

It is submitted there is no warrant to the assertion below that air safety is the touchstone of public policy supporting the administrative practice. No one has offered in the record or elsewhere to demonstrate the truth of this proposition, the respondent having merely relied on "the common knowledge of mankind." (Resp. Brief below, p. 29.)

It is submitted that the contrary is actually the fact. Commercial flying demands the highest degree of proficiency. It is mandatory for professional pilots to maintain their skills at their peak by constantly exercising them. Of course, the Respondent Board is fully cognizant of this important aviation axiom.

The Civil Air Regulations in several instances require *recent* flying experience in order to obtain and exercise the privileges of an airline transport pilot rating. See C.A.R. Secs. 21.16, 21.41, 21.42, 40.301; 14 C.F.R. Secs. 21.16, 21.41, 21.42, 40.301-2 (Appendix pp. 3a to 7a). In order to maintain such rating, an airline transport pilot must undergo a route familiarity examination (C.A.R. Sec. 40.302; 14 C.F.R. Sec. 40.302) at least once every twelve months, and at least each six months he must satisfactorily demonstrate his navigation, instrument, radio and other flight skills in actual flight. C.A.R. Sec. 40.302, *supra*.

Hence, the Board's present insistence that it is promoting safety by grounding experienced airmen is not only inconsistent with its own regulations, but is a misconception of its statutory powers. Clearly, the grounding of an experienced and qualified airman for any period whatsoever cannot be in the public interest.

If anything, it will tend to make a pilot less qualified—at least temporarily.[1]

This administrative anomaly can be remedied by reversing the Court below. It is probably unnecessary to add that there is an ample deterrent element (assuming, *arguendo,* that it is necessary in order to require pilots to fly safely), in imposing a pecuniary fine after full judicial process, including trial by jury, as contemplated by Congress in Sections 901-903. Indeed, the structure of the Act is such, as pointed out above, that Congress must have believed the fine would have a more incisive and more forceful deterrent effect than suspension.

II. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Section 903 (b) (1) of the Act (49 U.S.C.A. Sec. 623 (b) (1)) details the procedure in respect to civil penalties for violation of Title VI (the authority for promulgating Civil Air Regulations). Paragraph (4) of that Section states:

> "(4) The Supreme Court of the United States, and under its direction other courts of the United States, may prescribe rules regulating such proceedings in any particular not provided by law."

Reported cases of these decisions are rare and, so far as we are aware, this Court has never had occasion to

[1] The present case, involves only a 10 day suspension, but recent Board cases indicate 6 months is within its concept of the public interest. Indeed, there is no limit to the sanctions possible under Section 609, a fact that is embraced by C.A.R. 21.24(d); 14 C.F.R. 21.24(d) (App. p. ....) which authorizes *revocation* as legitimate *sanction.*

prescribe, or direct other courts to prescribe, such rules not otherwise provided by law.

The present atrophic condition of Sections 901 and 903 is a result of administrative legislation and is inconsistent with the substantial body of law that must have been anticipated by the Congress[2] in order to have induced it to provide this important provision. A glance at Titles V, VI and VII (the only parts of the Act subject to the civil penalties of Section 901) will demonstrate that this congressional foresight could be predicated only upon anticipated judicial proceedings involving any penalty for violations of the regulations promulgated under Title VI.

This premise considered, it is respectfully urged that it is of importance to that segment of the public involved in interstate and foreign air commerce that this Court consider this case to determine in what cases the holders of certificates issued by the Civil Aeronautics Administration are entitled to judicial process and a trial by jury.

Petitioner wishes finally to advise the Court that there is now pending in the United States Court of Appeals for the Seventh Circuit the case of *Hard* v. *Civil Aeronautics Board*, No. 11989 in which although there are additional considerations, the issue is similar to the issue presented herein, i.e., whether under Section 609 of the Act the respondent has the power to invoke penal sanctions by suspending an airman's certificate for violation of regulations. Oral argument is scheduled in that case for September 16, 1957.

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[2] See speech by Senator McCarran, 83 Cong. Rec. 6634 (May 9, 1938).

CONCLUSION

For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SIDNEY W. WILSON, *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

No. 13553.

United States Court of Appeals
District of Columbia Circuit.

Argued April 1, 1957

Decided May 9, 1957

* * * * * *

Mr. Lloyd Fletcher, Washington, D. C., for appellant.

Mr. O. D. Ozment, Chief Litigation and Research Division, Civil Aeronautics Bd., with whom Messrs. Franklin M. Stone, Gen. Counsel, Civil Aeronautics Bd., John H. Wanner, Associate Gen. Counsel, Civil Aeronautics Bd., Gerald F. Krassa and Ulrich V. Hoffmann, Attys., Civil Aeronautics Bd., and Daniel M. Friedman, Atty., Dept. of Justice, were on the brief for respondent. Mr. Robert L. Park, Atty., Civil Aeronautics Bd., also entered an appearance for respondent.

Before BAZELON, FAHY and DANAHER, Circuit Judges.

BAZELON, Circuit Judge.

Petitioner, an airline pilot, seeks review of Civil Aeronautics Board orders which (1) suspended his airman certificate for ten days, and (2) denied reconsideration of the suspension. The single issue is stipulated to be:

> Whether, in circumstances in which the Civil Aeronautics Board does not find the pilot to be unqualified to fly, the Board is empowered under Section 609 of

the Civil Aeronautics Act[1] to suspend his airman certificate as a deterrent sanction.

Under § 609, the Board "may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or *suspend* * * * [his] airman certificate * * *, *if the interest of the public so requires* * * *." Emphasis added.

Petitioner argues that, since reexamination is a condition precedent to action under § 609, the section must be read to authorize suspension only for lack of competence or qualifications as an airman. Disciplinary action for violation of regulations, he says, is covered exclusively by § 901 of the Civil Aeronautics Act[2] which provides that a "person who violates [regulations] shall be subject to a civil penalty of not to exceed $1000 for each such violation." His view is that Congress did not authorize suspension of a certificate for disciplinary purposes. We cannot agree.

By resting suspension on a Board determination that "the interest of the public so requires," Congress conferred broad discretionary authority upon the Board. What Congress had in mind appears from the direction contained in § 601(b) of the Act[3] that the Act be administered "in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation * * *." Nothing in the Act or its legislative history persuades us that disciplinary action for violation of regulations was intended to be the exclusive province of § 901.

Moreover, the Board has never recognized such exclusivity in its administration of the Act. From the effective date of the Act in 1938 through June 30, 1956, the

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[1] 52 Stat. 1011 (1938), 49 U.S.C.A. §559.

[2] 52 Stat. 1015 (1938), 49 U.S.C.A. § 621.

[3] 52 Stat. 1007 (1938), 49 U.S.C.A. § 551.

Board has suspended approximately 4000 airmen for violation of rules, without findings that they lacked competence or qualifications and without requiring re-examination before reinstatement. This consistent and, until now, unchallenged administrative practice "will not be overturned except for very cogent reasons * * *." Norwegian Nitrogen Products Co. v. United States, 1933, 288 U.S. 294, 315, 53 S. Ct. 350, 358, 77 L.Ed 796. The most cogent of reasons—air safety—supports the administrative practice here under attack.

Affirmed.

Statutes Involved

The Civil Aeronautics Act of 1938 (52 Stat. 973) as amended, (49 U. S. C. A. 401 *et seq.*), provides in part:

Sec. 609 (52 Stat. 1011, 49 U.S.C.A. 559)

"The Board may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Administrator of Civil Aeronautics in refusing to issue to the holder of such certificate a like certificate . . . ."

Sec. 901 (52 Stat. 1015, 49 U.S.C.A. 621)

"(a) Any person who violates (1) any provision of subchapters V, VI, and VII of this chapter, or any provision of subsection (a) (1) of section 181 of this title, or (2) any rule or regulation issued by the Post-

master General under this chapter, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Board or the Postmaster General, as the case may be . . . ."

"(b) In case an aircraft is involved in such violation and the violation is by the owner or person in command of the aircraft, such aircraft shall be subject to lien for the penalty . . . ."

Sec. 903 (52 Stat. 1017, 49 U.S.C.A. 623)

"(b) (1) Any civil penalty imposed under this chapter may be collected by proceedings in parsonam against the person subject to the penalty . . . Such proceedings shall conform as nearly as may be to civil suits in admiralty, except that either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be re-examined other than in accordance with the rules of the common law . . . ."

"(4) The Supreme Court of the United States, and under its direction other courts of the United States, may prescribe rules regulating such proceedings in any particular not provided by law."

C.A.R. 21.16, 14 C.F.R. Sec. 21.16 *Aeronautical experience.*

An applicant for an airline transport pilot rating shall hold a valid commercial pilot rating, or equivalent as determined by the Administrator, and shall meet the following aeronautical experience requirements:

(a) Applicant shall have had at least 250 hours of flight time composed of time as pilot in command, or time as copilot actually performing the duties and functions of a pilot in command under the surveillance of the pilot in command, or any combination thereof. Of this time, at least 100 hours shall have been cross-country flight time, and at least 25 hours shall have been night flight time. Flight time shown in fulfillment of the requirements of this paragraph may also be used for the purposes of paragraph (b) of this section.

(b) Applicant shall have had at least 1,200 hours of flight time as pilot within the last 8 years, of which

(1) 5 hours shall have been had within 60 days immediately preceding the date of application;

(2) 500 hours shall have been cross-country flight time;

(3) 100 hours shall have been night flight time;

(4) 75 hours shall have been instrument time under actual or simulated instrument conditions of which not less than 50 hours shall have been in actual flight.

C.A.R. 21.24, 14 C.F.R. Sec. 21.24.

(d) Nothing in this section shall be construed to deny or defeat the jurisdiction of the Federal courts, the Administrator, or the Board to impose any authorized sanction, including revocation of the certificate, for a violation of the act or of the regulations in this sub-chapter occurring during the effective period of the certificate.

C.A.R. 21.41, 14 C.F.R. Sec. 21.41 *Passenger carrying.*

A certificated airline transport pilot shall not pilot any aircraft carrying any person other than members of the crew thereof, certificated airmen carried in air carrier aircraft in furtherance of their official duties, or a certificated instructor rated for the aircraft operated, unless, within the 90 days immediately preceding, he shall have made at least 3 take-offs, and three landings to a full stop, in an aircraft of the same category (§ 21.34) and if an airplane, within the same class (§ 21.35 (a)) as that of the aircraft in which any such person is carried.

C.A.R. 21.42, 14 C.F.R. Sec. 21.42 *Recent experience requirements.*

(a) *Passenger flight (day and night).* A certificated airline transport pilot shall not pilot an aircraft carrying any person other than the members of the crew thereof, certificated airmen carried in air carrier aircraft in fur-

therance of their official duties, or a certificated instructor rated for the aircraft operated, unless within the preceding 3 calendar months he shall have made and logged at least 3 take-offs and landings to a full stop in an aircraft of the same category, class, and type as that of the aircraft in which such person is carried.

(b) *Instrument flight.* A certificated airline transport pilot, who within the preceding 6 calendar months has not flown and logged at least 2 hours of flight time solely by reference to instruments under either actual or properly simulated instrument flight conditions, shall not pilot an aircraft under such conditions until he has flown and logged at least 2 hours of such flight time accompanied by a certificated pilot of at least private grade holding an appropriate category, class, and type rating for the aircraft and authorized to operate aircraft under instrument conditions.

C.A.R. 40.301, 14 C.F.R. Sec. 40.301 *Pilot recent experience.*

No air carrier shall schedule a pilot to serve as such in scheduled air transportation unless within the preceding 90 days he has made at least 3 take-offs and 3 landings in the airplane of the particular type on which he is to serve.

C.A.R. 40.302, 14 C.F.R. Sec. 40.302. *Pilot checks.*

(a) Line check: Prior to serving as pilot in command, and at least once each 12 months thereafter, a pilot shall satisfactorily accomplish a line check in one of the types of airplanes normally to be flown by him. This check shall be given by a check pilot who is qualified for the route. It shall consist of at least a scheduled flight between terminals over a route to which the pilot is normally assigned during which the check pilot shall determine whether the individual being checked satisfactorily exercises the duties and responsibilities of pilot in command.

(b) Proficiency check: (1) An air carrier shall not utilize a pilot as pilot in command until he has satisfactorily demonstrated to a check pilot or a representative of the Administrator his ability to pilot and navigate airplanes to be flown by him. Thereafter, at least twice each 12 months at intervals of not less than 4 months or more than 8 months, a similar pilot proficiency check shall be given each such pilot. Where such pilots serve in more than one airplane type, the pilot proficiency check shall be given in the larger airplane type at least once each 12 months.